No. 92-486

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

—v.—

EDGE BROADCASTING COMPANY, t/a Power 94,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE SUBMITTED BY THE ASSOCIATION OF NATIONAL ADVERTISERS, INC. AND THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES IN SUPPORT OF RESPONDENT

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Questions Presented

1. May Congress forbid a broadcaster "licensed to" a location in North Carolina, a non-lottery state, from disseminating truthful information concerning the Virginia State lottery when ninety-two percent of the broadcaster's audience resides in Virginia; when the broadcaster's studio and corporate headquarters are in Virginia; and when the eight percent of the broadcaster's audience residing in North Carolina already receives identical messages from broadcasters in Virginia?

2. May North Carolina, a state which forbids lotteries, impede its residents from receiving truthful commercial information about the existence of a lawful state-run lottery in Virgina in order to give North Carolina's ban extra-territorial effect? If not, may Congress attempt to provide such an unconstitutional service for North Carolina?

3. Is a radio station with a transmitter in North Carolina exclusively "licensed to" North Carolina within the meaning of 18 U.S.C. sec. 1307 even though its studio and corporate offices are in Virginia and ninety-two percent of its audience resides in Virginia?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: PAGE

Statutes:

Other Authorities:

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Interest of Amici Curiae

The Association of National Advertisers, Inc., (A.N.A.) and The American Association of Advertising Agencies (A.A.A.A.) respectfully submit this brief *amici curiae* in support of respondent in this case. Letters of consent to the filing of this brief have been lodged with the clerk of the Court.

The Association of National Advertisers, Inc., the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to

advertise on a national and regional basis. *Amici*'s members market and advertise a kaleidescopic array of goods and services and account for almost 80% of the nation's annual national and regional advertising expenditures. As the nation's two principal communities of commercial speakers, *amici* have long been committed to the advancement of truthful commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

Statement of the Case and Summary of Argument

Lotteries have led a chequered existence in our culture. During the colonial period and the early days of the Republic, state-chartered private lotteries were a respectable activity. Thomas Jefferson himself sought permission to operate a lottery as a means of retiring his debt. During the era of Jacksonian reform, however, lotteries fell from favor and were universally outlawed by the states as sinful and unfair to the poor. In recent years, thirty-three states, including Virginia, have elected to operate state-run lotteries in order to raise money for governmental purposes. Seventeen states, including North Carolina, continue to ban lotteries, public and private. See generally Blakey and Kurland, *The Development of the Federal Law of Gambling*, 63 Corn. L. Rev. 923, 927-958 (1978).

Congressional legislation affecting lotteries was initially aimed at preventing the privately operated Louisiana lottery from unlawfully selling tickets to purchasers in the non-lottery states in violation of the laws of those states.[1] In its heyday, the Louisiana lottery generated 93% of its revenue by illegally selling tickets within the territory of non-lottery states, either

[1] By 1878, only one legal lottery remained in the United States—the Louisiana lottery. Thirty-five states banned all lotteries. Two states, Delaware and Vermont, permitted authorized lotteries, but failed to grant any authorizations.

through the mail or through direct delivery.[2] In 1868, Congress banned "letters or circulars concerning lotteries" from the mails in an effort to prevent the use of the mails by the Louisiana lottery to sell tickets unlawfully in non-lottery states.[3] *Ex parte Jackson*, 96 U.S. 727 (1878). In 1890, the postal ban was extended to newspapers containing lottery advertisements.[4] *In re Rapier*, 143 U.S. 110 (1892). In 1895, Congress banned the transportation of lottery tickets in interstate or foreign commerce in an effort to prevent the Louisiana lottery from relocating to Central America and using messengers instead of the mail to sell tickets unlawfully in non-lottery states.[5] *Champion v. Ames (Lottery Case)*, 188 U.S. 321 (1903). Finally, in 1934, a ban was imposed on the broadcast of "any advertisement or information concerning any lottery".[6]

[2] When the Louisiana lottery was finally terminated in the early 1890's, the volume of mail in the New Orleans Post Office fell by a third.

[3] Act of July 27, 1868, ch. 246, sec. 13, 15 Stat. 196; Act of July 12, 1876, ch. 186, sec. 2, 19 Stat. 90; currently codified as 18 U.S.C. 1301.

[4] Anti-Lottery Act of 1890, ch. 908, sec. 1, 26 Stat. 465; currently codified as 18 U.S.C. 1302.

[5] The 1895 Act has been narrowly construed to exempt persons who lawfully purchase a lottery ticket in a lottery state and then return to their home in a non-lottery state. *United States v. Fabrizio*, 385 U.S. 263, 272 (1966) (Stewart, J., dissenting).

[6] 18 U.S.C. 1304. Despite the broad language of the ban on broadcasting "information" about lotteries, courts have uniformly construed the statute narrowly to exempt news and opinion. Eg. *Frank v. Minnesota Newspaper Ass'n*, 490 U.S. 225 (1989); *New York State Broadcasters Ass'n v. United States*, 414 F.2d 990 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970); *New Jersey State Lottery Comm'n v. United States*, 491 F.2d 219 (3rd Cir. 1974) (en banc), vacated as moot, 420 U.S. 371 (1975). For additional examples of the tradition of narrowly construing the lottery statutes, see *Francis v. Ames*, 188 U.S. 375 (1903); *France v. United States*, 164 U.S. 676 (1897); *United States v. Halseth*, 342 U.S. 277 (1952); *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284 (1954).

During the period when lotteries were universally outlawed by the states, Congress' decision to ban commercial speech about private lotteries from the mails and the airwaves did not pose a difficult First Amendment issue. Since commercial speech inviting a hearer to engage in unlawful activity is entitled to no First Amendment protection, and since the lottery advertisements subject to the bans did just that by urging citizens of non-lottery states to purchase lottery tickets unlawfully in those states, the narrow holdings of both *Jackson* and *Rapier* remain good law today. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

Beginning in 1963, however, when New Hampshire decided to operate a lawful state-run lottery, lotteries have undergone a legal renaissance. In the ensuing 30 years, thirty-three states have decided to operate state lotteries. With state-run lotteries legal in fully two-thirds of the states, a Congressional ban on mailing, broadcasting or transporting truthful information about lotteries can no longer be justified as a device to prevent the dissemination of commercial speech inviting hearers to engage in unlawful activity, especially since, unlike the 19th century Louisiana lottery, state-run lotteries make no effort to sell lottery tickets in any state where it is unlawful to do so.

Confronted with radically changed circumstances, Congress modified its justification for the lottery speech bans. Instead of the 19th century argument that commercial speech about lotteries is wholly unprotected because it is an invitation to engage in pervasively unlawful activity, Congress now argues that its modified speech ban is designed to reinforce the policies of the 17 non-lottery states. Thus, under the new regime imposed by Sec. 1307, only speech emanating from a non-lottery state is banned.[7]

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[7] 18 U.S.C. sec. 1307 provides, in part:

> The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to . . . an advertisement . . . concerning a lottery conducted by a State acting under the authority of State law which is . . . broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery.

If Sections 1304 and 1307 were aimed at preventing state-run lotteries from urging residents of non-lottery states to purchase lottery tickets within those states in violation of the laws of the non-lottery states, the current lottery speech ban would resemble its 19th century cousin. But all concede that unlawful sale of state-run lottery tickets within the borders of non-lottery states is not a problem. If residents of non-lottery states wish to purchase state-run lottery tickets, they must do so within the lottery state where the transaction is lawful. Thus, the only purpose of the contemporary Congressional censorship of speech about state-run lotteries is to prevent residents of non-lottery states from learning about their lawful option of travelling to a lottery state to purchase a lottery ticket. Accordingly, it flatly violates *Bigelow v. Virginia*, 421 U.S. 809 (1975).

In *Bigelow*, Virginia sought to make it a crime for newspapers published in Virginia to print truthful advertisements describing abortion services that were lawful in New York, but unlawful in Virginia. *Bigelow* unfolded during the interregnum between New York's decriminalization of abortion in 1970 and this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). During that period, the legality of abortion varied widely from state to state, much as the legality of lotteries varies from state to state today. This Court reversed the conviction of a Virginia newspaper for publishing a truthful advertisement about a lawful New York clinic, holding that Virginia lacked power to seek to keep its residents in ignorance of the existence of lawful options available to them in other states.[8]

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[8] Under the "undue burden" standard adopted in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), variations between and among the states as to the lawful availability of abortion services will almost certainly evolve. The *Bigelow* principle at issue in this case assures that information about lawful options in less restrictive states will be available to residents of the more restrictive states.

In this case, Congress is attempting to provide precisely such an unconstitutional service to North Carolina and the other non-lottery states. Just as Virginia lacked power to use its police power in *Bigelow* to keep its citizens in ignorance of lawful options available to them in New York, Congress lacks a legitimate interest in assisting North Carolina in keeping its citizens in ignorance of lawful options available to them in Virginia.[9]

Moreover, in the context of this case, Congress' solicitude for the interests of North Carolina is particularly misplaced, since: (1) the message being censored is overwhelmingly directed to Virginia residents who constitute 92% of the listening audience; and (2) the broadcaster's studio and corporate headquarters are both located in Virginia. The fortuitous existence of an F.C.C. document licensing Edge Broadcasting to a transmitter on North Carolina soil cannot justify the censorship of a truthful message about the Virginia State lottery aimed overwhelmingly at Virginia residents, which is broadcast from a studio located in Virginia by a radio station with its corporate offices in Virginia. Whatever interest may exist in shielding North Carolina residents from information about lawful activities in Virginia, Congress may not deprive Virginia residents of truthful information about activities that are lawful in Virginia.

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[9] *Bigelow* involved unconstitutional state censorship of newspapers. This case involves virtually identical Congressional censorship of broadcasters at the behest of a state. Whatever additional power Congress may have to regulate the broadcast spectrum, it does not include the power to "launder" unconstitutional state efforts to censor speech. *F.C.C. v. League of Women Voters*, 468 U.S. 221 (1984). As the legislative history of sec. 1307 makes clear, Congress' motive in imposing restrictions on speech about lotteries is purely derivative of its desire to reinforce the police power regulations of the non-lottery states. No independent federal interest underlies sec. 1307. H.Rep. No. 93-1517, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 7007.

Finally, even if North Carolina had a legitimate interest in walling its citizens off from information about lawful options in Virginia—*amici* do not believe that such an interest would be legitimate—Congress' scheme is a hopelessly arbitrary and irrational means of advancing that interest, since the small percentage of the broadcast audience who actually live in North Carolina concededly—and lawfully—receive the identical information every day from broadcasters "licensed to" Virginia.

ARGUMENT

I. THIS CASE MAY NOT BE DISPOSED OF BY A SIMPLISTIC ASSERTION THAT THE "GREATER POWER" TO BAN LOTTERIES CARRIES WITH IT THE "LESSER POWER" TO BAN TRUTHFUL COMMERCIAL SPEECH ABOUT THEM

Instead of seeking to grapple with the difficult free speech and federalism issues raised by Congress' quixotic effort to build information walls around non-lottery states, the United States attempts a simplistic approach by arguing that since lotteries can be banned altogether, truthful commercial speech about them may be banned without raising a serious free speech issue. Relying on a misreading of the holding in *Posadas de Puerto Rico v. Tourism Co.*, 478 U.S. 328 (1986), the United States argues that the "greater power" to ban an activity necessarily carries with it the "lesser power" to ban truthful commercial speech about it.

Such an argument fails for two reasons. First, the assumption that voluntary participation in a lawful state-run lottery may be banned by Congress or by a neighboring state is flatly wrong. Neither Congress nor a neighboring state may punish persons for travelling to a lottery state to participate in a lawful state-run lottery. Thus, the so-called "greater power" simply does not exist in this case.

Second, and even more fundamentally, the assertion that government censorship may be used as a way to influence lawful consumer choice cannot be squared with the intellectual underpinnings of commercial free speech. The power to ban truthful speech about a lawful option is not a so-called "lesser power" subsumed within the general regulatory authority of the state. It is the most dangerous thing a government can do. It substitutes government manipulation of information for open regulatory debate. It treats Americans as pawns on a government-controlled information chessboard. Thus, banning truthful speech about lawful options may be justified, if at all, only under stringent rules imposed by the First Amendment.

A. The So-Called "Greater Power" to Ban Persons From Travelling to a Lottery State to Participate in a Lawful State-Run Lottery Does Not Exist

1. North Carolina Lacks Power to Bar Its Residents From Purchasing a State-Run Lottery Ticket in Virginia

North Carolina does not possess the "greater power" to ban its residents from travelling to Virginia to purchase a ticket in the state-run lottery. While North Carolina may exercise its police power to ban gambling within its borders, it may not seek to give its police power regulations extra-territorial effect by forbidding North Carolinians from engaging in the forbidden activity in a state where the activity is lawful.[10]

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[10] Eg., *Brown-Forman Distillers v. N.Y. Liquor Authority*, 476 U.S. 573 (1986); *Edgar v. MITE Corporation*, 457 U.S. 624 (1982); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Huntington v. Atrill*, 146 U.S. 657, 669 (1892); *Kidd v. Pearson*, 128 U.S. 1 (1888).

Skiriotes v. Florida, 313 U.S. 69 (1941) is not to the contrary, since the arguably extra-territorial application of Florida law took place in international waters, not in a sister state where the activity in question was explicitly authorized by law.

The very essence of a federal union—expressed in the interrelationship between the Full Faith and Credit Clause of Article IV, Section 1, the Privileges and Immunities Clause of Article IV, Section 2, the Commerce Clause and the Due Process Clause of the Fourteenth Amendment—forbids a state from seeking to lock its residents into its parochial laws by giving them extra-territorial effect. For example, North Carolina forbids gambling. But it cannot forbid North Carolinians from gambling in Nevada. In 1972, Virginia forbade abortion. But this Court ruled in *Bigelow* that Virginia could not seek to prevent its residents from obtaining lawful abortions in New York. Thus, the suggestion that Congress is merely reinforcing North Carolina's "greater power" to ban the activity at issue in this case is untenable.

2. Congress Lacks Power to Prohibit Voluntary Participation in State-Run Lotteries

Strictly speaking, Congress' independent powers are not at issue in this case, since the avowed purpose of section 1307 is not to advance any independent federal policy, but merely to respect the legitimate police powers of the non-lottery states. H.Rep. No. 93-1517, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 7007. Since the non-lottery states clearly lack the "greater power" to ban activity that is lawful in the lottery states, section 1307 can do no more than reflect that lack of power.

Moreover, Congress itself would lack the power to outlaw voluntary participation in a state-run lottery taking place within the lottery state. Relying on the 19th century cases dealing with the Louisiana lottery[11], the United States assumes that Congress possesses plenary authority to ban interstate participation in lotteries and, therefore, possesses plenary authority over speech about such lotteries. However, whatever Congress' power

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[11] *Ex parte Jackson*, 96 U.S. 727 (1878); *In re Rapier*, 143 U.S. 110 (1892); *Champion v. Ames (Lottery Case)*, 188 U.S. 321 (1903).

under the Commerce Clause to ban participation in privately operated lotteries posing a danger of corruption and infiltration by organized crime, Congress lacks power to prohibit persons from voluntarily purchasing a lottery ticket from a state-run lottery within the lottery state. Whether the lack of Congressional power flows from the 10th Amendment, since state-run lotteries are integral parts of a state's taxing and funding structure[12]; from the constitutional right to travel, since Congress lacks the power under Article IV, Section 2 of the Constitution to lock Americans into the legal regime of a particular state[13]; or from the lack of a national police power[14], the net result is clear—the activity at issue in this case, the voluntary purchase of a state-run lottery ticket within the borders of a lottery state—is not within the so-called "greater power" of Congress to prohibit.

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[12] Compare *Coyle v. Smith*, 221 U.S. 559, 565 (1911) (Congress may not direct a state to move its capitol); *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513 (1936) (Congress may not authorize involuntary bankruptcy of state political subdivision); and *United States v. New York*, 112 S.Ct. 2408 (1992) (Congress may not require states to perform regulatory functions) with *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (Congress may apply federal minimum wage rules to state employees), overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976).

[13] See Eg., *Corfield v. Coryell*, 6 Fed. Cas. 546, 551-52 (No. 3230) (C.C.E.D.Pa. 1823); *Crandall v. Nevada*, 73 U.S. 35 (1867); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Edwards v. California*, 314 U.S. 160 (1941); *Toomer v. Witsell*, 334 U.S. 385 (1948); *United States v. Guest*, 383 U.S. 745, 757-59 (1966); *Doe v. Bolton*, 410 U.S. 179 (1973); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

[14] Justice Harlan warned in *Maryland v. Wirtz*, 392 U.S. 183, 197, n.27 (1968) that the Commerce Clause may not be used as an indirect means of establishing a national police power over personal decisions more properly subject to regulation under state police power.

Thus, unlike the Commonwealth of Puerto Rico in *Posadas*, neither Congress nor North Carolina possesses constitutional power to ban the activity at issue in this case. Instead, the United States argues that Congress and North Carolina should be given an extra-constitutional power to ban the activity indirectly by the use of information control. The government's overbroad reading of *Posadas* is bad enough when applied to the facts of that case. But the attempt by the United States to effect an exponential increase in the reach of *Posadas* to permit censorship of speech by a sovereign in an effort to control behavior that is beyond its constitutional control would be a First Amendment and a federalism disaster.

B. The Power to Ban an Activity Does Not Carry With It the Power to Ban Truthful Commercial Speech About It As a Lawful Option

As *amici* have demonstrated, neither of the sovereigns seeking the power to censor in this case posesses the constitutional power to ban the activity at issue. Even if such a power existed, however, it would not justify banning truthful speech about a lawful activity. Government-imposed censorship may not be used as a behavior control device in an effort to manipulate the lawful choices open to Americans.

1. The Holding of *Posadas* Does Not Support the Dictum That Truthful Commercial Speech May Be Censored to Manipulate Consumer Demand For a Lawful Product

While dicta in the *Posadas* opinion suggests that the power to ban an activity includes the power to censor truthful commercial speech about it, the holding of the Court is far narrower. In *Posadas*, the Commonwealth of Puerto Rico wished to legalize casino gambling in an effort to enhance the tourism revenues of the Commonwealth. The Commonwealth initially banned all advertising by casinos that was capable of reaching the attention of residents of the Commonwealth. 478 U.S. at

332-33. In order to avoid First Amendment concerns, the Superior Court of Puerto Rico narrowed the total advertising ban, holding that advertisements in Spanish language papers likely to come to the attention of residents were protected, unless they were intentionally "aimed" at them. 487 U.S. at 335-36. Thus, as narrowed by the Commonwealth's courts, the ban included only promotional advertising intentionally designed to exacerbate the potentially unfair attraction of the casinos to an audience deemed particularly vulnerable by the legislature of Puerto Rico.

In *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986), this Court affirmed the ban as narrowed by the Commonwealth's courts. While portions of the Chief Justice's opinion speak more broadly than necessary, the *Posadas* holding merely reiterates the well-established principle that advertising intentionally designed to exploit a particularly vulnerable audience may be limited. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).[15]

2. The Dictum in *Posadas* is Inconsistent With Established First Amendment Analysis

In the absence of speech intentionally designed to exploit a particularly vulnerable audience, the dictum in *Posadas* is untenable. The very purpose of granting First Amendment protection to commercial speech was the recognition that truthful

[15] *Amici* believe that even the narrow ban imposed by the Commonwealth's courts was unconstitutional, since it was premised on an assumption that residents of Puerto Rico are less competent than North Americans to assess the effects of truthful casino advertising. While the increased deference shown to legislative judgments involving cultures and social systems different from our own may explain the Court's deference to the Commonwealth's legislative judgment in *Posadas*, an attempt to transfer its paternalistic (and racist) premises to First Amendment law generally would be a drastic mistake. Competence to assess truthful speech does not vary by race, class or gender.

advertising provides consumers with the necessary raw material for informed and autonomous choice. *Morales v. T.W.A.*, 112 S.Ct. 2031 (1992). Unlike First Amendment protection for political or artistic speech which is largely driven by concern for the dignitary interest of the speaker, the engine that drives commercial speech is the instrumental need of a consumer for information that enhances the capacity for free choice.[16] Indeed, only when a cognizable hearer interest has been absent has the Court upheld censorship of commercial speech.[17]

When, as with the 19th century advertising for the Louisiana lottery, the "choice" offered to a consumer involves the com-

[16] Eg. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763-65 (1976) (right to receive commercial messages); *Linmark Associates, Inc. v. Borough of Willingboro*, 431 U.S. 85, 96-97 (1977) (right to receive real estate information); *Carey v. Population Services, Int'l.*, 431 U.S. 678, 701 (1977) (right to receive birth control information); *Bates v. State Bar of Arizona*, 433 U.S. 350, 374-75 (1977) (right to receive price information on legal services); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 567-68 (1980) (right to receive information on electrical services); *In re R.M.J.*, 455 U.S. 191 (1982) (right to receive information on legal services); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (right to receive birth control information); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643, 646-47 (1985) (right to receive information on legal services); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (same); *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91, 110 and n.18 (1991) (same).

[17] Eg. *Friedman v. Rogers*, 440 U.S. 1 (1979) (risk of misleading hearers justifies restriction on use of trade names by optometrists); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (lack of cognizable hearer interest justifies banning speech proposing unlawful commercial transaction); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989) (safety interest of student-hearers justifies stringent regulation of outsiders in college dormitories; remanded to determine whether regulation unconstitutionally overbroad).

mission of an unlawful act, the consumer has no legitimate interest in receiving the information. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973). Similarly, when advertising is false or misleading, it does not enhance the capacity of a consumer for free choice. Quite the contrary, it distorts free choice by undermining its raw material. *Friedman v. Rogers*, 440 U.S. 1 (1979). Finally, when the "choice" offered a consumer is not a free one, because the consumer is in a particularly vulnerable situation, as in the case of an accident victim confronted by a prospective lawyer, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), the commercial speech at issue may be regulated, but not banned, to prevent the intentional exploitation of the vulnerable consumer. *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91 (1991)

But where, as here, the consumer choice is lawful; the advertisement is truthful; and the speech is not an intentional effort to mislead a particularly vulnerable audience, the First Amendment forbids the government from censoring a commercial message in an effort to manipulate the behavior of the hearer.

The dictum in *Posadas* arguing that the power to regulate an activity carries with it the power to censor truthful commercial speech about it is premised on two faulty assumptions. First, the dictum assumes that, in the area of constitutional rights, the axiom that "the greater power necessarily includes the lesser power" is good law; and, second, that censorship of speech about a lawful activity is a "lesser" form of regulation than a flat ban on the activity. Both are demonstrably wrong.

The argument that the "greater" governmental power to prevent an activity entirely authorizes the government to place whatever "lesser" conditions it wishes on its exercise, has been rejected in every context in which it has been asserted. See generally, Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415 (1989); Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4 (1988). This Court has repeatedly recognized that one of the most important functions of a constitution is to constrain the government in placing unconstitutional conditions on the exercise of its so-called discretionary functions.[19]

Thus, when Justice Rehnquist argued that merely because the government could decide whether or not to create certain categories of employment, an employee must "take the bitter with the sweet" and accept a job conditioned on a waiver of procedural due process rights, this Court firmly rejected his position. Compare, *Arnett v. Kennedy*, 416 U.S. 134 (1974) (opinion of Justices Rehnquist, Stewart and Chief Justice Burger) with *Id* at 167 (opinion of Justices Powell and Blackmun); *Id* at 185 (opinion of Justice White); *Id* at 211 (opinion of Justices Marshall, Brennan and Douglas). Indeed, the Chief Justice's "bitter with the sweet" approach was explicitly rejected by eight members of the Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

Similarly, when the Chief Justice argued that since the government was under no duty to fund non-commercial television, it could condition funding on a waiver of the ability to broadcast privately funded editorials, the Court explicitly rejected

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[19] Eg. *Elrod v. Burns*, 427 U.S. 347 (1976); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Speiser v. Randall*, 357 U.S. 513 (1958); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *F.C.C. v. League of Women Voters*, 468 U.S. 221 (1984). For an early statement of the principle, see *Frost v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926).

his position, holding that the "greater" power did not include the "lesser" power to censor.[20] *F.C.C. v. League of Women Voters*, 468 U.S. 221 (1984).

The Court should similarly reject Chief Justice Rehnquist's dictum in *Posadas*.

In defense of his dictum, the Chief Justice argued in *Posadas* that censoring commercial speech about an activity is a less drastic government response than an outright ban. But such an argument misconstrues a fundamental postulate of a free society—the integrity of autonomous, indivdual choice.

Regulation of behavior is inevitable in a complex world. While it interferes with autonomous choice, regulation of behavior occurs openly, and only after a full political debate. Regulation of thought achieved through government manipulation of the flow of truthful information is a far more "drastic" event, since it attacks autonomous choice in a covert manner. It leaves citizens with the illusion of freedom. Each believes that his or her decisions are the product of free will. In fact, however, information control masks the reality of government manipulated behavior. A free society can tolerate regulation of behavior. A free society cannot survive regulation of thought.

Nor can the Chief Justice's dictum be defended because it applies solely to commercial speech. The interest of a consumer in receiving truthful information relevant to the making of informed economic decisions is no less important than the interests at stake in other free speech settings. While the rules governing commercial and non-commercial speech differ, they do so because of functional differences between the two areas and not because commercial speech is less important or of lower social value. Differential standards of speech protection

[20] *Rust v. Sullivan*, 112 S.Ct. 1759 (1989), even if correctly decided, is not to the contrary, since it dealt with the government's right to decide how its own resources were to be expended. This case attempts to dictate the speech of private actors using their own resources.

should not turn on subjective, necessarily content-based value judgments about the relative social worth of categories of expression. *Young v. American Mini Theaters*, 427 U.S. 50, 82, n.6 (1976) (Powell, J. concurring); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 761 (1978) (Powell, J. concurring). Implicit in a determination that commercial speech is less important than non-commercial speech is a complex set of value judgments that the First Amendment leaves to individuals, not to the State. Characterizing speech about religion, esthetics or politics as important, while denigrating the importance of speech about commerce, masks an impermissible cultural judgment. In effect, it says that speech about ideas, the "business" of intellectuals, is free from governmental restriction; but that speech about everyone else's "business" is fair game for casual regulation by the State. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 Am. Econ. Rev. 384 (1974); Director, *The Parity of the Economic Marketplace*, 7 J.L. & Econ. 1 (1964); Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945).

Moreover, an assertion that commercial speech is less important than non-commercial speech is wrong, both at the level of society and the individual. The First Amendment protects political democracy and free markets by assuring the uncensored flow of information on which each depends. Political democracy requires robust free speech protection in order to assure that voters receive information needed to make an informed choice. See Meiklejohn, *Free Speech and Its Relationship to Self-Government* (1948).

Free markets also depend upon informed choice. *Morales v. T.W.A.*, 112 S.Ct. 2031 (1992); *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764-65 (1976) (recognizing relationship between commercial speech and efficient markets). See Coase, *Advertising and Free Speech*, 6 J. Legal Stud. 1 (1977). Consumers vote with their dollars, just as citizens vote with their ballots. If government

can casually control the flow of political information to voters, the free political choice at the core of a functioning democracy is imperilled. See Kalven, *The New York Times Case: A Note on the "Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191. Similarly, if government can casually control the flow of commercial information to consumers, the free market choice at the core of our economic system is imperilled. See Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash L. Rev. 429 (1971).

Thus, the Chief Justice's dictum in *Posadas* should be rejected.

II. THE ATTEMPT TO CENSOR RESPONDENT DOES NOT DIRECTLY ADVANCE A SUBSTANTIAL GOVERNMENTAL INTEREST. ACCORDINGLY, IT CANNOT SURVIVE ANALYSIS UNDER *CENTRAL HUDSON*

Whatever the fate of the dictum in *Posadas*, any effort to censor commercial speech must satisfy the exacting standard established in *Central Hudson Gas & Electric Corp. v. Public Svc. Comm'n*, 447 U.S. 557 (1980). Pursuant to the *Central Hudson* test, if commercial speech is truthful and concerns a lawful product, it may be regulated only in aid of a "substantial governmental interest"; only if the regulation "directly advances" that interest; and only if the regulation is "narrowly tailored".

A. The Lottery Speech Ban Does Not Advance a Legitimate Governmental Interest, Much Less a "Substantial" One

As *amici* have demonstrated, the only governmental interest advanced by the speech ban imposed by section 1307 is the desire to prevent North Carolinians from learning about the existence of a lawful option available to them in Virginia.

Since North Carolina does not possess constitutional power to ban its citizens from travelling to Virginia in order to engage in lawful activities there, the only conceivable reason for the ban is to prevent North Carolinians from learning about lawful options existing beyond the state's borders. This Court has already firmly branded such an interest as constitutionally illegitimate. *Bigelow v. Virginia*, 421 U.S. 809 (1975).[21]

B. The Lottery Speech Ban Does Not "Directly Advance" Any Governmental Interest At All

Even if one assumes that North Carolina's interest in keeping its residents in ignorance of lawful options open to them in Virginia is legitimate; even substantial, section 1307 does not "directly advance" that interest, since it explicitly authorizes

[21] *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 D.D.C. 1971) aff'd summarily, 405 U.S. 1000 (1972) provides no support for the selective ban on lottery advertisements for four reasons. First, *Capital Broadcasting* was decided before First Amendment protection was afforded to commercial speech. Second, Congress, in enacting section 1307, relied solely on reinforcing North Carolina's police power. Accordingly, the statute must stand or fall on the legitimacy of North Carolina's interest in shielding its citizens from information about lawful activities in Virginia. Third, the legitimate Congressional interest in *Capital Broadcasting* did not involve an effort at content-based censorship. Rather, it turned on the difficulty of applying the "fairness doctrine" to tobacco advertising. Finally, the District Court declined to grant the broadcaster-litigants standing to raise the free speech interests of advertisers. 333 F. Supp. at 584. See generally, 333 F. Supp. at 587-594 (J. Skelly Wright, dissenting).

Whatever regulatory power Congress may possess over broadcasting under the so-called "scarcity" rationale to assure that an issue like the health hazards associated with smoking is covered "fairly", it does not include the power to make arbitrary, content-based judgments designed to shield the citizens of one state from truthful information describing lawful options available to them in a neighboring state. *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984).

broadcasters "licensed to" Virginia to broadcast the forbidden message into North Carolina. Pursuant to section 1307, the eight percent of respondent's audience that lives in North Carolina is virtually unaffected by the ban, since they already receive the same information from Virginia broadcasters. Thus, the sole practical effect of the censorship is to deprive respondent of the advertising revenue derived from Virginia businesses at which lottery tickets may be lawfully purchased—a wholly irrational and discriminatory result. *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Company v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

The only governmental interest actually served by the censorship is symbolic. But symbolism cannot justify censorship that blocks residents of a state from receiving information concerning lawful options available in other states.

C. The Lottery Speech Ban is Not "Narrowly Tailored"

Finally, even if North Carolina's interest were deemed legitimate; and even if the regulation could be said to "directly advance" that interest, it is not "narrowly tailored" within the meaning of *Central Hudson*. As with the original advertising ban in *Posadas* that was narrowed by the Commonwealth's courts, section 1307 makes no effort to distinguish between speech "aimed" at a Virginia audience and speech intentionally "aimed" at North Carolinians. Thus, for example, the ban forces respondent to reject advertisements for Virginia businesses, such as "7/11 Stores" merely because the advertisement includes a statement that Virginia State lottery tickets are available on the premises. Such an unnecessarily overbroad ban is precisely analagous to the flat ban on casino advertising in the Spanish language press that was originally banned by Puerto Rico. The Superior Court of Puerto Rico invalidated such a ban as too broad, replacing it with a far narrower ban on advertising intentionally "aimed" at residents. No reason exists why the F.C.C. ban should not be similarly narrowed.

D. The Constitutionality of a Content-Based Speech Ban Must Be Determined on an "As Applied" Basis.

Stung by the obvious irrationality of the operation of section 1307 in this case, the United States attempts an unprecedented flight from the facts. Since, the United States argues, section 1307 might have a more defensible application to radio stations broadcasting within a single state, its constitutionality must be upheld even in those settings where, as here, censorship is utterly irrational.[22] Brief of United States at p. 33.

The government's argument confuses the standard of review used in rare settings where legislation regulating speech or association is subjected to facial review with the standard of review in traditional "as applied" cases. In recent years, the Court has occasionally departed from the traditional rule that litigants in First Amendment cases must challenge statutes as applied to them and has permitted litigants to challenge the facial constitutionality of censorship statutes without regard to the precise facts of the litigant's case.[23] In each setting where facial review has been permitted, the Court feared that widespread censorship might take place unless the rule requiring "as applied" review was relaxed. Thus, a litigant seeking facial review must demonstrate that the challenged statute is likely to violate First Amendment rights in a significant percentage of its applications. *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988). The robust nature of commercial speech has made it unnecessary, however, to resort to facial review techniques. Thus, in a commercial speech setting,

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[22] As *amici* have argued, North Carolina lacks a legitimate interest in forbidding its citizens from hearing advertisements for state-run lotteries in nearby states, even if a broadcast signal were beamed to a predominantly North Carolina audience. *Bigelow v. Virginia*, 421 U.S. 809 (1975).

[23] Eg. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (facial overbreadth); *Smith v. Goguen*, 415 U.S. 566 (1974) (facial vagueness); *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92 (1972) (content-based discrimination).

a litigant is *required* to challenge the statute "as applied", relying solely on the facts of his or her case. *Bates v. State Bar of Arizona*, 433 U.S. 350, 379-80 (1977).

The claim of the United States that the statute must be upheld if it is capable of constitutional applications elsewhere, even though its current application is indefensible, boils down to the unprecedented assertion that a litigant who is *required* to raise an "as applied" challenge to a censorship statute may not succeed unless the litigant proves that the statute will be facially unconstitutional in a significant percentage of its applications, regardless of whether it is constitutional as applied in the litigant's case.

Not surprisingly, the United States is unable to cite First Amendment precedent dealing with content-based censorship for its revolutionary attempt to graft facial review standards onto the "as applied" process. Indeed, the United States concedes that classic "as applied" review has been the norm in commercial speech cases. *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91 (1990); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Bates v. State Bar of Arizona*, 433 U.S. 350, 379-80 (1977). Instead, the United States argues that standards of review utilized in equal protection cases involving rational basis scrutiny provide an analogy. *Vance v. Bradley*, 440 U.S. 93 (1979). But the very reason that *Virginia Pharmacy* recognized First Amendment protection for commercial speech in the first place was to escape from rational basis scrutiny that virtually assured widespread censorship of information of assistance to consumers in making informed market judgments.

The United States also argues that time, place or manner regulations can be applied to speakers even when they are not strictly necessary in the particular case, as long as they are likely to be necessary in most cases. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). But it is one thing to require a speaker to comply with a reasonable time, place or manner

rule; it is quite another to silence a speaker absolutely for no reason at all. When, as here, the consequence of government regulation is a content-defined ban on speech (not merely its regulation as to time, place, or manner), the government cannot defend the censorship merely by arguing that censorship in some other setting would be constitutional. No case has ever suggested that irrational censorship is valid merely because censorship in an entirely different setting might be defensible.

In fact, the United States' attempt to avoid defending its censorship on the facts of this case is premised on a re-run of its argument that the greater power to ban lotteries carries with it a virtually uncontrolled discretion to manipulate commercial speech about lotteries in order to "regulate" consumer demand. As the United States candidly admits, the extraordinary power to censor irrationally that is sought in this case is necessary because government censors "must be free to experiment with a variety of regulatory measures in order to limit consumer demand to whatever level is deemed appropriate". Brief of United States, p.35. Thus, only if commercial speech is reduced to wholly unprotected status and subjected to the permissive level of rational basis scrutiny applied in non-speech settings can the government's proposed standard of review be taken seriously.

III. RESPONDENT IS "LICENSED TO" BOTH NORTH CAROLINA AND VIRGINIA WITHIN THE MEANING OF SEC. 1307.

It is clear, both from the legislative history of section 1307, thoroughly discussed in the decision of the District Court, 732 F. Supp. at 643-46, and from F.C.C. practice, that the term "licensed to" means, at a minimum, the community described in the F.C.C. licensing document where the station's transmitter is often located. Thus, at a minimum, respondent is "licensed to" North Carolina.

But nothing in the language of section 1307, or in F.C.C. practice, prevents a broadcaster from being "licensed to" more than one community. Indeed, a number of radio stations have been licensed to more than one state.[24] Where, as here, a radio station maintains its studio and its corporate headquarters in Virginia and broadcasts to an audience that is ninety-two percent Virginian, but maintains its transmitter in North Carolina, the station should be deemed "licensed to" both North Carolina and Virginia for the purposes of section 1307.

While the phrase "licensed to" has an accepted meaning in F.C.C. practice, the proposed construction would respect that meaning by recognizing that respondent is "licensed to" North Carolina. Nothing in F.C.C. practice, however, requires treating the term as having only one fixed and unchanging meaning. *Amici* suggest that for 1307 purposes, the phrase can mean, in addition to its F.C.C. term of art, the state in which the broadcast studio is located, in which corporate headquarters are situated, and in which the vast bulk of the audience resides.

Such a construction of section 1307 is textually plausible, consistent with the underlying purpose of section 1307 and, most importantly, would save the statute from almost certain invalidation. *Lowe v. S.E.C.*, 472 U.S. 181 (1985); *DeBartolo Corp. v. Fla. Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 573-576 (1988).

In *Debartolo*, the Court required an "affirmative" expression by Congress of its desire to ban "consumer publicity" leafletting. See also *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Similarly, the Court should construe "licensed to" in section 1307 as referring to both North Carolina and Virginia, thereby permitting respondent to broadcast truthful advertisements about the Virgina State lottery to a predominantly Virginia audience, unless Congress has "affirmatively" expressed an intention to ban the speech in question.

[24] The F.C.C. agrees that if a broadcaster is "licensed to" two states, one of which is a lottery state, it qualifies for the exemption from section 1304 provided by section 1307. H.Rep. No. 93-1517, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 7007, 7022. As of 1974, fifty-two radio stations were "licensed to" more than one location. Five of the dual license stations were "licensed to" two states. *Id.* at 7022.

While the District Court was correct in observing that Congress declined to remove all geographical controls from section 1307 in 1988, 732 F. Supp. at 645-46, Congress' desire to continue a geographically defined ban on predominantly intra-state stations does not constitute an affirmative command to impose the ban on a station that overwhelmingly broadcasts to a lottery state audience *and* which has its studio and its corporate headquarters in a lottery state.

Conclusion

For the above-mentioned reasons, the decisions of the courts below should be affirmed.

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